UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

BRAINWARE, INC.

Plaintiff,

—against—

SCAN-OPTICS, LTD. and
SCAN-OPTICS, LLC,

Defendants.

Civil Action No. 3:11cv755-REP

SCAN-OPTICS, LLC'S REPLY BRIEF REGARDING CERTAIN MATERIALS WITHHELD AS PRIVILEGED

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ARGUMENT

I. COMMUNICATIONS WITH PATRIARCH'S IN-HOUSE COUNSEL ARE PRIVILEGED

In its opening brief, Scan-Optics USA established that the communications between, on the one hand, lawyers employed by Patriarch Partners, LLC and, on the other, Scan-Optics-USA or Scan-Optics UK were properly withheld as privileged. Scan-Optics USA cited cases from courts across the country holding that (i) sharing privileged communications among corporate affiliates does not waive the privilege, and (ii) "a corporate 'client' includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations." *In re Nucletron Mfg. Corp.,* No. 93-34486S, 1994 WL 16191611, at *2 (Bankr. E.D. VA. Mar. 17, 1994.) (Doc. 62 at 2-3 & n. 2. (collecting cases).) Patriarch is an affiliate under common ownership with both Scan-Optics and Scan-Optics UK, and Patriarch lawyers were asked for, and did provide, confidential legal advice to Scan-Optics USA and Scan-Optics UK, neither of which has its own legal department, concerning the dispute that gave rise to this litigation. (Schiff Decl. ¶¶ 1-2; Sweeny Decl. ¶¶ 2-3.) Those communications are privileged and were properly withheld.

Brainware acknowledges that the privilege is generally preserved among corporate affiliates and, further, that the privilege across corporate affiliates is usually based on either a "joint client" theory or a "common interest" theory of privilege. (Doc. 64 at 8.) Brainware's lone argument against applying the joint client theory here is to question whether "Patriarch's in-house lawyers were ever truly 'retained' by Scan-Optics USA and Scan-Optics UK to 'jointly represent' them with respect to this litigation." (Doc. 64.) But Brainware cites no case requiring that an attorney be "truly 'retained'" (whatever that means) for communications to be privileged, and, in fact, there is no such requirement. Rather, "[o]ne who consults a lawyer with a view to obtaining professional legal services from him or her is regarded as a client for purposes of the privilege." 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2017 (3d ed. 2010). Thus, for example, even preliminary communications that never result in a formal engagement are protected by the privilege. *See, e.g.*, 1 Paul R. Rice, Attorney-Client Privilege in the U.S. § 2:4 (1993 & Supp. 1997) ("Rice") ("Since the rationale of the attorney-client privilege is to encourage more open communications from the client to the attorney when legal advice is being sought, the attorney-client relationship begins when the attorney is initially approached by a prospective client for that purpose . . . ."); Edna Selan Epstein, The Attorney Client Privilege And The Work Product Doctrine § 1.III.E2.A.1 ("The privilege protects initial consultations . . . ."); *In re Bevill, Bresler & Schulman Asset Mgmt Corp.*, 805 F.2d 120, 124 n.1 (3d Cir. 1986) ("The attorney-client privilege protects conversations between prospective clients and counsel as well as communications with retained counsel."). The relevant question is not whether a formal engagement letter has been executed but, rather, whether "legal assistance in the form of advice or representation is being sought and the communications were made in confidence." Rice § 2:4; *see also Smith v. James C. Hormel Sch. of the Va. Inst. of Autism,* Civil Action No. 3:08cv00030, 2010 U.S. DIST. LEXIS 95668, at *6 (W.D. Va. Sept. 14, 2010) (communications are privileged "when the party divulging confidences and secrets to an attorney believes that he is approaching the attorney in a professional with the intent to secure legal advice"). The sworn and unrebutted affidavits in evidence clearly establish that governing standard. On this basis alone, Brainware's challenge should be rejected.

Brainware's remaining arguments focus on the "common interest" theory of privilege, which, because the joint client theory discussed above suffices, the Court need not even reach. In any event, each of Brainware's arguments on this issue are incorrect.

Brainware first contends that that the communications at issue took place "well before Scan-Optics USA even knew that it would be added as a party to the litigation," and argues that, as a result, the defendants and Patriarch lacked a common legal interest at the time. (Doc. 64 at 9) But Brainware does not bother to explain how the legal interests of Patriarch and the defendants could diverge in any way. Courts recognize that "[c]orporations which are related through common ownership or control, however, need not meet the strict standard" otherwise applicable for the common interest doctrine to apply, because "such inter-related corporate communications are treated in the same manner as intra-corporate communications." *Music Sales Corp. v. Morris*, No. 98 Civ. 9002 (SAS) (FM), 1999 U.S. DIST. LEXIS 16433, at *21-22 (S.D.N.Y. Oct. 22, 1999) (internal citations and quotations omitted); *see also In re Napster, Inc. v. Bertelsmann AG*, No. C MDL-00-1369 MHP, 2005 U.S. DIST. LEXIS 11497, at *14-15 (N.D. Cal. Apr. 11, 2005) ("[T]he interests of a corporate parent and its subsidiaries are in most cases so closely aligned that no particularized inquiry into the nature of the common interest asserted is necessary . . . ."). In fact, the case most cited in Brainware's opposition acknowledges that maintaining the privilege among corporate affiliates is "unquestionably correct" and that "any other result would wreak havoc on corporate counsel offices." *Teleglobe Communs. Corp. v. BCE*, 493 F.3d 345, 369 (3d Cir. 2007).

Contrary to Brainware's argument, the fact that not all of the affiliated companies are named parties to the suit does not change the analysis. In *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990), for example, a litigant argued that the common interest theory of privilege was inapplicable because the "[s]ubsidiary was not named as a party" to the suit, but the Fourth Circuit found "no case in which the existence of a joint defense or common interest privilege turned on such distinctions," and concluded that the "district court's ruling, apparently based on the notion that the joint defense privilege is limited to codefendants, was in error." *Id*. at 249; *see also United States v. Gumbaytay*, 276 F.R.D. 671, 675 (M.D. Ala. 2011) (collecting cases where "courts have extended the common interest rule beyond parties and clients alone, to non-parties in current litigation and even 'potential co-parties to prospective litigation'") (citation omitted).

Brainware also contends that Patriarch's relationship with Scan-Optics USA and Scan-Optics UK is "too remote" and not "analogous to the parent/subsidiary relationship" at issue in several other cases. (Doc. 64 at 10.) But the case law could not be more clear that the privilege and work product protections apply across corporate affiliates, not just between parents and their immediate subsidiaries. *In re Nucletron Mfg. Corp.*, 1994 WL 16191611, at *2 (privilege extends to "parent, subsidiary, and affiliate corporations"); *United States v. AT &T*, 86 F.R.D. 603, 616 (D.D.C.1979) (same); *Weil Ceramics & Glass, Inc. v. Work*, 110 F.R.D. 500, 503 (E.D.N.Y. 1986) (privilege among "related companies, sharing a single grandparent"); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1184 (D.S.C. 1974) (privilege among "formally different corporate entities which are under common ownership"). Here, there can be no dispute that all the entities at issue are closely affiliated. The funds that own both Scan-Optics USA and Scan-Optics UK can only act through Patriarch as their manager, and all the entities at issue are under common ownership. (Schiff Decl. ¶ 1.) The basic structure here — a separate management company for funds that invest in operating businesses — is common for private equity firms and hedge funds, and courts have upheld the privilege in those contexts. *See, e.g., SEC v. Beacon Hill Asset Mgmt. LLC*, 231 F.R.D. 134, 147 (S.D.N.Y. 2004) (upholding work product protection for communications between investment manger and hedge funds it managed). Brainware cites no case in which corporate affiliates under common ownership were not sufficiently related for the privilege to apply. The best it can do is cite *United States v. Duke Energy Corp*., 214 F.R.D. 383, 388-389 (M.D.N.C. 2003), which addressed communications among members of a trade association. Brainware's unsupported position should be rejected.

Finally, Brainware continues to assert that communications among affiliated corporate entities can only be protected from disclosure if each entity is separately represented by counsel and the communications are between those separately retained attorneys. That argument fails for the reasons set out in Scan Optics' USA's opening brief. Those purported requirements are imposed nowhere in the large body of case law regarding privileged communications among affiliated corporate groups, including in *Teleglobe*, the sole case relied upon by Brainware. (Doc. 64 at 3-4.) *See also, e.g. In re Outsidewall Tire Litig.*, No. 1:09cv1217, 2010 U.S. DIST. LEXIS 67578 at *8 (E.D. Va. July 6, 2010) ("[T]he Fourth Circuit has implied that an attorney must be on *either* end of the communication.") (emphasis added.).[1]

II. COMMUNICATIONS WITH SCAN OPTICS UK'S LITIGATION COUNSEL ARE PRIVILEGED

As discussed in detail above and in Scan Optics UK's opening brief, communications between outside litigation counsel for Scan Optics UK and Scan Optics USA are properly withheld because communications among corporate affiliates do not waive privilege or the work product protections. In opposition, Brainware rehashes the same arguments it made with respect to the Patriarch communications — that any privilege was waived because Scan Optics USA did not share a common legal interest at the time of the communications, that Scan Optics USA did

[1] Brainware suggests that the work product protections cannot apply here because, at the time of the communications, the only anticipated claim was against Scan-Optics UK, not (Scan-Optics USA). But Brainware cites no authority (and we are aware of none) for the proposition that work product protections are limited to entities anticipating litigation against themselves, as opposed to corporate affiliates. In any event, Scan-Optics USA could anticipate litigation even before a claim was filed against it, and Brainware has not disputed that the documents at issue here were, in fact, created in anticipation of litigation. (Schiff Decl. ¶ 3; Sweeny Decl. ¶ 5.)

not anticipate litigation at that time, and that Scan-Optics USA was not separately represented by counsel who was also on the withheld communications. For the reasons discussed above, those arguments are meritless and should be rejected. Scan-Optics USA also respectfully refers the Court to, and incorporates here by reference, the briefing of Scan-Optics UK on this issue.

III. INTRA-CORPORATE COMMUNICATIONS AMONG NON-LAWYERS REFLECTING LEGAL ADVICE OR INTENDED TO FACILITATE LEGAL ADVICE ARE PRIVILEGED

In its opening brief, Scan Optics USA established that communications among non-lawyers identified on Scan Optics USA's privilege log were properly withheld because the privilege protects both the distribution of legal advice among corporate personnel, and the gathering of information by corporate employees for transmission to corporate counsel. Brainware cannot dispute that these types of communications are properly privileged and does not discuss or distinguish the numerous cases Scan-Optics USA cited to that effect. (Doc. 62 at 5 & n.3.)[2] Instead, Brainware argues "it is impossible to judge whether the advice is truly 'legal' advice or some other advice, such as 'business' advice." (Doc. 64 at 5.) But Brainware's raw conjecture that the log entries are false should be rejected out of hand, without further examination of the documents. As explained in Scan-Optics USA's opening papers — and completely ignored in opposition — properly-documented log entries establish a *prima facie* basis to withhold documents, and *in camera* review should be limited to instances where there is a good-faith factual basis to doubt the log or a legal dispute as to the scope of privilege. (Doc. 62 at 6 (citing *NLRB v. Interbake Foods, LLC,* 637 F.3d 492, 502 (4th Cir. 2011).) These strictures prevent "opponents of the privilege [from] engage[ing] in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents." *United States v. Zolin*, 491 U.S. 554, 571 (1989). Should the Court nevertheless indulge the fishing expedition Brainware seeks to impose, the affidavits and evidence confirm that the documents, in fact, reflect legal advice and were properly withheld.

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[2] Brainware appears to suggest (although its brief is confusing on this point) that this Court's decision in *ePlus Inc. v. Lawson Software,* 2012 U.S. DIST. LEXIS 21636 (E.D. Va. Feb. 21, 2012) (Payne, J.) somehow ruled that communications among nonlawyers cannot be privileged (Doc. 64 at 16), but the case quite clearly says the opposite. 2012 U.S. DIST. LEXIS 21636, at *18 ("The fact that certain entries refer to documents which forward legal advice or contain such advice does not necessarily constitute waiver with respect to those entries.").

CONCLUSION

For the stated reasons, and those in Scan-Optics USA's opening brief, the Court should reject Brainware's challenges and order that the materials at issue may continue to be withheld from production.

Respectfully submitted,

By: _/s/ Robert R. Musick____________

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CERTIFICATE OF SERVICE

I certify that the foregoing pleading was filed on this 21st day of June, 2012, using the Court's CM/ECF system which served a copy on all parties entitled to receipt thereof.

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